

CONTRACT #9
RFS # 317.05-065

**Department of Finance &
Administration
Division of Administration
Information Systems
Management**

VENDOR:
CyberShift, Incorporated

REQUEST: NON-COMPETITIVE CONTRACT

RECEIVED

JAN 24 2006

FISCAL REVIEW

APPROVED

Commissioner of Finance & Administration

Date:

Each of the request items below indicates specific information that must be individually detailed or addressed as required. A request can not be considered if information provided is incomplete, non-responsive, or does not clearly address each of the requirements individually as required.

1) RFS #	317.05-065	
2) State Agency Name :	Department of Finance and Administration	
3) Service Caption :	TRIPS application support and maintenance	
4) Proposed Contractor :	CyberShift, Incorporated	
5) Contract Start Date : (attached explanation required if date is < 60 days after F&A receipt)	March 15, 2006	
6) Contract End Date IF <u>all</u> Options to Extend the Contract are Exercised :	March 14, 2011	
7) Total Maximum Cost IF <u>all</u> Options to Extend the Contract are Exercised :	\$705,000 (estimated)	
8) Approval Criteria : (select one)	<input type="checkbox"/> use of Non-Competitive Negotiation is in the best interest of the state <input checked="" type="checkbox"/> only one uniquely qualified service provider able to provide the service	
9) Description of Service to be Acquired :	Licensing, support and maintenance of the TRIPS application, which will be used by State agencies to process claims for reimbursement of travel expenses.	
10) Explanation of the Need for or Requirement Placed on the Procuring Agency to Acquire the Service :	Per T.C.A. 4-3-1008 (3), The Department of Finance and Administration is required to "prepare uniform rules and regulations for the payment of travel expenses for officers and employees of all state departments, institutions and agencies. It is the legislative intent that such rules and regulations provide, through travel advances and reimbursement, or both, that an employee under normal circumstances shall be responsible for bearing travel expenses for no more than thirty (30) days from the date of filing a claim, subject to an audit of the claim as required." The processes associated with the payment of travel expenses have been automated through the use of the TRIPS application. The TRIPS application is based on a software package, NavigatER, which is owned and distributed exclusively by the proposed contractor.	
11) Explanation of Whether the Procuring Agency Bought the Service in the Past, & if so, What Procurement Method It Used :	The service was initially procured by RFP issued in late 2000. Use of the NavigatER product and associated services has been under contract FA-01-14462, the term of which began March 15, 2001.	

12) Name & Address of the Proposed Contractor's Principal Owner(s) :
(not required if proposed contractor is a state education institution)

Thomas Altier, Chief Financial Officer
CyberShift, Incorporated
239 New Road, Building B
Parsippany, NJ 07054

13) Evidence of the Proposed Contractor's Experience and Length of Experience Providing the Service :

The proposed contractor is the exclusive owner and distributor of the NavigatER product and associated services. The State of Tennessee has been using the NavigatER product since March 15, 2001.

14) Documentation of Office for Information Resources Endorsement :
(required only if the subject service involves information technology)

select one:

☐

Documentation Not Applicable to this Request

☒

Documentation Attached to this Request

15) Documentation of Department of Personnel Endorsement :
(required only if the subject service involves training for state employees)

select one:

☒

Documentation Not Applicable to this Request

☐

Documentation Attached to this Request

16) Documentation of State Architect Endorsement :
(required only if the subject service involves construction or real property related services)

select one:

☒

Documentation Not Applicable to this Request

☐

Documentation Attached to this Request

17) Description of Procuring Agency Efforts to Identify Reasonable, Competitive, Procurement Alternatives :

A competitive RFP for the purpose of acquiring an automated solution for processing travel claims was done in late 2000. All providers of this type of service were allowed opportunity to submit a proposal. The best-evaluated proposal resulted in contract # FA-01-14462, under which the NavigatER product and associated services were acquired. The resulting application, TRIPS, is now being used by three State departments to process travel claims. Plans are in place to continue to expand the use of TRIPS to other State departments as quickly as is logistically possible. In order to continue to use and expand the use of TRIPS, ongoing licensing of the NavigatER product is required. This licensing is provided exclusively by the proposed contractor. Therefore, no efforts (beyond the competitive RFP done in late 2000) have occurred for the purpose of identifying reasonable, competitive procurement alternatives.

18) Justification of Why the State Should Use Non-Competitive Negotiation Rather Than a Competitive Process :
(Being the "only known" or "best" service provider to perform the service as desired will not be deemed adequate justification.)

The NavigatER product is now fully functioning in the State's information architecture. The TRIPS application, which makes use of the NavigatER product, is currently being used by three State departments to process travel claims. Plans are in place to continue to expand the use of TRIPS to other State departments as quickly as is logistically possible. In order to do so, licensing for the use of the NavigatER product is required. This licensing is provided exclusively by the proposed contractor.

REQUESTING AGENCY HEAD SIGNATURE & DATE :

(must be signed & dated by the ACTUAL procuring agency head as detailed on the Signature Certification on file with OCR— signature by an authorized signatory will be accepted only in documented exigent circumstances)

Agency Head Signature

Date



STATE OF TENNESSEE
DEPARTMENT OF FINANCE AND ADMINISTRATION
DIVISION OF ADMINISTRATION
INFORMATION SYSTEMS MANAGEMENT
312 EIGHTH AVENUE NORTH
20th FLOOR WILLIAM R. SNODGRASS TENNESSEE TOWER
NASHVILLE, TENNESSEE 37243
(615) 741-8200
FAX (615) 741-8941

DAVE GOETZ
COMMISSIONER

JIMMY LICHTENSTEIN
DIRECTOR

TO: Dave Goetz, Commissioner
Department of Finance and Administration

FROM: Jan Sylvis, Chief of Accounts *JIS*
Department of Finance and Administration

DATE: January 20, 2006

SUBJECT: Explanation of Late Delivery of Non-Competitive Contract Request

Enclosed is the non-competitive contract request, and related documentation, associated with the contract for ongoing support of the Travel Reimbursement Information Processing System (TRIPS). The anticipated contract start date is March 15, 2006, which is less than 60 days from the date of receipt by the Office of Contracts Review. Additional preparation and review time was required due to the fact that the application makes use of non-standard software.

If you have any questions, please advise.

Thank you for your attention to this matter.

CC: Mike Morrow

/dck

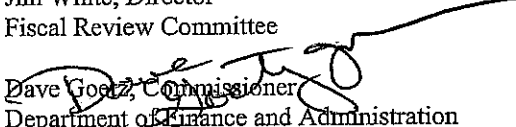


STATE OF TENNESSEE
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DAVE GOETZ
COMMISSIONER

JIMMY LICHTENSTEIN
DIRECTOR

TO: Jim White, Director
Fiscal Review Committee

FROM: 
Dave Goetz, Commissioner
Department of Finance and Administration

DATE: January 17, 2006

SUBJECT: TRIPS Ongoing Support Contract

Enclosed you will find a non-competitive contract request and related documentation for approval by the Fiscal Review Committee. The Non-competitive Contract Request form reflects an estimate of the total maximum cost for the contract in question. This estimate can be broken down as follows:

1.	Hourly Reimbursements	\$80,000
2.	Software Licensing	600,000
3.	Travel Expense Reimbursements	<u>25,000</u>
	Total Maximum Cost Estimate	<u>\$705,000</u>

NOTES:

1. The actual total hourly reimbursements amount paid to the Contractor, under the contract term of contract number FA-01-14462, was \$64,100. Allowing for an inflation rate of approximately 25% since 2000, when hourly rates of reimbursements were fixed, the hourly reimbursements cost is estimated to be \$80,000.
2. Software licensing for the period 2001-2006 has been \$96,444 per calendar year, for a total five-year cost of \$482,220. Allowing for an inflation rate of approximately 25% since 2000, when this rate was fixed, the software licensing cost is estimated to be approximately \$120,000 per year, or \$600,000 over a five-year period.
3. The actual total travel expense reimbursements amount paid to the Contractor, under the contract term of contract number FA-01-14462, was \$23,822. Travel by the Contractor under this contract is expected to be significantly less than under the previous contract (FA-01-14462). Therefore, the travel expense reimbursement cost is estimated to be no greater than \$25,000.

Final costs will be determined through negotiations with the Contractor, and updated in the contract document accordingly.

Thank you for your consideration of this matter.

Enclosures: Non-competitive Contract Request
 OIR Procurement Endorsement
 Contract Information Supplement
 TRIPS ongoing support contract

CC: Mike Morrow
 Jan Sylvis

/dck



FAX TRANSMITTAL

TO : Bill Ezell, Chief Information Officer
Office for Information Resources FAX # 532-0471

FROM : Jan Sylvis, Chief of Accounts FAX # 741-1789

DATE : January 10, 2006

RFS # 317.05-065

RE : Procurement Endorsement — TRIPS Application Support and
Maintenance Services

NUMBER OF FAX PAGES (including cover) : 26

The nature and scope of service detailed in the attached service procurement document(s) appears to require Office for Information Resources (OIR) review and support, because the procurement involves information technology or information systems services.

This communication seeks to ensure that OIR is aware of the procurement and has an opportunity to review the matter. Please determine whether OIR is supportive of the procurement. If you have any questions or concerns about this matter, please call **Debbie Knox** at **741-4099**.

Please indicate below your response to this proposed procurement, and return this communication at your earliest convenience (note the return FAX number above).

Thank you for your help.

Attachment(s) — Non-Competitive Contract Request — TRIPS
TRIPS Maintenance Contract


OIR Endorsement :

Bill Ezell (jc)

1/13/06

OIR Chief Information Officer Signature

Date

FA CONTRACT INFORMATION SUPPLEMENT FOR ALL FA-TYPE CONTRACTS — COMPLETE <u>EITHER</u> SECTION A <u>OR</u> SECTION B	
Contract RFS #	317.05 – 065
Contractor:	CyberShift, Incorporated
SECTION A— CONTRACTOR IS AN INDIVIDUAL	SECTION B— CONTRACTOR IS A COMPANY (e.g., sole proprietorship, partnership, or corporation)
Is or has the contractor been a state employee? <input type="checkbox"/> NO (no additional information required) <input type="checkbox"/> YES	Does an individual, who is or has been a state employee, own controlling interest in (or own) the contractor company? <input checked="" type="checkbox"/> NO (no additional information required) <input type="checkbox"/> YES
Was such employment within the past six months? <input type="checkbox"/> NO <input type="checkbox"/> YES (an approved rule exception permitting a contract within six months of employment is also required)	Was such employment within the past six months? <input type="checkbox"/> NO <input type="checkbox"/> YES (an approved rule exception permitting a contract within six months of employment is also required)
Does the contractor receive Tennessee Consolidated Retirement System (TCRS) retirement benefits? <input type="checkbox"/> NO <input type="checkbox"/> YES (the procuring agency general counsel <i>MUST</i> sign an analysis of this procurement using the TCRS analysis guidelines)	Does the individual who owns controlling interest in the contractor company receive Tennessee Consolidated Retirement System (TCRS) retirement benefits? <input type="checkbox"/> NO <input type="checkbox"/> YES (the procuring agency general counsel <i>MUST</i> sign an analysis of this procurement using the TCRS analysis guidelines)
SIGNATURE	
	
SERVICE CONTRACTS COORDINATOR	DATE 1/13/06

**CONTRACT
BETWEEN THE STATE OF TENNESSEE,
DEPARTMENT OF FINANCE AND ADMINISTRATION AND
CYBERSHIFT, INCORPORATED**

This Contract, by and between the State of Tennessee, Department of Finance and Administration, hereinafter referred to as the "State" and CyberShift, Inc., hereinafter referred to as the "Contractor," is for the provision of software licensing and ongoing support services related to the application, Travel Reimbursement Information Processing System, as further defined in the "SCOPE OF SERVICES."

The Contractor is a for-profit corporation. The Contractor's address is:

239 New Road
Building B, 3rd Floor
Parsippany, N.J. 07054

The Contractor's place of incorporation or organization is the State of New York.

A. SCOPE OF SERVICES:

A.1. Technical Environment.

- a. Current Technical Environment - The TRIPS application data will reside on an Oracle 9i (or higher database) server on either a Unix Sun Solaris operating system V.2.6 (or higher) or on a Microsoft Windows 2003 Server (or higher) operating system.

The TRIPS application server will run on a Microsoft Windows 2003 Server (or higher) operating system, with the Web Server Component being served on BEA Web Logic 5.01 (or higher) or Microsoft IIS 5.0 (or higher).

The TRIPS application must allow the application to run on client PCs with a minimum of a Pentium II processor, 64 megabytes of random access memory, and run under Windows 2000 and Windows XP workstation. Client computers that require Java Virtual Machine should be running version 1.3.1_09 (or higher). The TRIPS application must support access via Microsoft Internet Explorer version 6.01 (or higher).

The TRIPS application must meet a four second response time (end to end, which is defined as a typical "user to application" interaction of time from "enter" key depression to displayed result from application) 95 percent of the time for workstations at the Nashville Capitol Complex offices. The TRIPS application must meet a ten second response time (end to end) 95 percent of the time for workstations outside of the Nashville Capitol Complex offices connecting via the State's wide area network. The TRIPS application must meet a two-minute response time (end to end) 95 percent of the time for workstations connecting remotely through a dial-up network connection.

The TRIPS application must be developed such that all application execution occurs behind the State's firewall. The TRIPS application must be a secure Internet application that utilizes Secure Socket Layers (SSL) or Transport Layer Security (TSL), with an encryption level of at least 128 bit.

The TRIPS application must be available to the users from 6:00 a.m. to 9:00 p.m. Central Time 95 percent of the time. Any background printing must not interfere with use of the system. Batch processing must be completed from 9:00 p.m. to 6:00 a.m. Central Time. A daily backup of the entire system must be executed and completed between 9:00 p.m. and 6:00 a.m. Central Time.

The TRIPS application must allow for up to 5000 concurrent users. As of the effective date of this contract, this is accomplished by creating multiple instances of the application, due to significant limitations in the software's capacity related to concurrent users.

- b. Target Technical Environment – It is the State's expectation of the Contractor that the software product(s) licensed to the State by means of this contract is enhanced and upgraded periodically by the Contractor. These enhancements and upgrades are made for the purpose of advancing and/or expanding one, some or all of the following: application functions and features, application performance, application security, quality and reliability, technology base used, etc. Notwithstanding the fact that, as of the effective date of this contract, and as described in section A.2., the use of specific non-standard software products has been or may be approved, it is therefore the State's expectation that the need for continued use of any and all non-standard software products can be eliminated through the Contractor's periodic enhancement and upgrading of the software product(s) licensed to the State by means of this contract.

Specifically, the following describes the areas where the State requires the Contractor to enhance or upgrade in order to eliminate the use of non-standard software, including but not necessarily limited to:

- The TRIPS application data will reside on an Oracle 10g (or higher database) server on either a Unix Sun Solaris operating system V.10.0 (or higher) or on a Microsoft Windows 2003 Server (or higher) operating system.
- The TRIPS application server will run on a Microsoft Windows 2003 Server (or higher) operating system, with the Web Server Component being served on BEA Web Logic 8.1 (or higher) or Microsoft IIS 5.0 (or higher).
- The TRIPS application must allow the application to run on client PCs with a minimum of a Pentium II processor, 64 megabytes of random access memory, and run under Windows 2000 and Windows XP workstation. Client computers that require Java Virtual Machine should be running version 1.4.2 (or higher). The TRIPS application must support access via Microsoft Internet Explorer version 6.01 (or higher).

In addition to the elimination of the use of non-standard software, the State requires the Contractor to enhance or upgrade the software product(s) licensed to the State by means of this contract in order to allow for up to 5,000 concurrent users without the need to create multiple instances of the application.

The Contractor must make the above referenced enhancements or upgrades within one hundred and eighty (180) days of the effective date of this contract.

A.2. Non-standard Software.

The State recognizes that some of the software as described in section A.1. are non-standard software for the State of Tennessee's environment, and acknowledges that as of the effective date of this contract, the State has approved the use of specific non-standard software product(s) as described in section A.1.

The Contractor may propose the use of additional non-standard software product(s) or in lieu of State standard software product(s). To determine what constitutes a State standard software product, please refer to the Tennessee Information Resources Architecture ("Technical Architecture"). The Contractor may request a copy of the Technical Architecture by submitting a written request to the State's contact listed in section E.2.

Any non-standard software proposed must be approved in writing by the State prior to installation or implementation of said software in the State technical environment. In order for a proposed non-standard software product to be approved for use, it must at minimum meet the following requirements:

- 1) The product(s) proposed must be currently marketed, and the most recent version/release of the product must have been generally available for twelve (12) months.
- 2) The product(s) manufacturer must have no stated intent to discontinue upgrades and maintenance of the product.
- 3) The product(s) must be fully supported by the product manufacturer. At a minimum this support must include the availability of maintenance contracts that provide for product upgrades, onsite support, and 24 x 7 telephone support.
- 4) Acquisition of any products proposed by the Contractor and allowed by the State will be the responsibility of the State; i.e. no 'third-party leases' will be allowed.
- 5) The product(s) must be operational in a production environment similar to that specified in section A.1.
- 6) The product(s) must be compatible with the State's hardware, operating system software, network hardware and software, and database management systems technical environment as defined above in section A.1.

If the State approves a proposal to use non-standard software, the contractor will be notified in writing a minimum of ninety (90) days prior to the effective date of the approval, and the change in the contractually required minimum technical environment, as defined in section A.1. will be affected through an amendment to the contract. The Contractor will be permitted to take the necessary steps to implement the use of the non-standard software product for which approval has been given by the effective date of the approval.

The State reserves the right to rescind said approval on any or all previously approved non-standard software. If the State decides to rescind any non-standard software approval, the contractor will be notified in writing a minimum of ninety (90) days prior to the effective date of the rescission, and the change in the contractually required minimum technical environment, as defined in section A.1., will be affected through an amendment to the contract. The Contractor must take the necessary steps to eliminate the use of the non-standard software product for which approval has been rescinded by the effective date of the rescission.

A.3. Disaster Recovery.

System operations must provide the capability to recover from disaster. A daily backup of the entire system must be executed and completed as described in section A.1. The State is responsible for off-site storage facilities and for physical DASD backup and off-site storage on a weekly basis.

A.4. Annual Upgrade and Support (Software Licensing).

The Contractor will enter into Annual Upgrade and Support ("software licensing") agreements with the State that provide the State with licensing for the software products that collectively constitute the application known as the Travel Reimbursement Information Processing System. Annual Upgrade and Support ("software licensing") agreements will commence on January 1st and terminate on December 31st of each calendar year occurring within the term of this contract (reference section B.). The State will be entitled to receive any upgrades, software fixes, and/or performance enhancement releases issued by the Contractor during the term of the Annual Upgrade and Support agreement(s). The Contractor will provide to the State release notes with each upgrade, software fix and/or performance enhancement release submitted issued by the Contractor. The State's employees will also be entitled to telephone and electronic

support provided by the Contractor during the term of the Annual Upgrade and Support agreement(s).

The State has purchased an Annual Upgrade and Support agreement for the software licensed for the period beginning January 1, 2006 and ending December 31, 2006 under a separate contract (FA-01-14462). The first such agreement to be purchased under this contract will be for the period beginning January 1, 2007. The State may subsequently, on an annual basis, purchase additional Annual Upgrade and Support agreements for the software licensed.

A.5. Problem Management.

The Contractor will address problem reports in an orderly and timely manner. A problem is defined as a failure of the application, in whole or in part, or the application's generation of an incorrect or inconsistent result. Problems are not defined as less than desirable or less than preferable processing, reporting, or presentation of data by the application; these are defined as enhancements (refer to severity level 4 below).

- a. Severity Level Definitions – For purposes of this section A.5., problems will be classified by severity levels based on the significance and impact of the problem on the usability of the application.
- Severity 1: results in the failure of the complete application. There is no acceptable alternative that will yield the desired result.
 - Severity 2: results in the complete failure of a subsystem, key business or technical function, or of a software unit within the system. There is no way to make the failed component(s) work. However, there is a documented, acceptable alternative that will yield the desired result. Note that if there is not a documented, acceptable alternative that will yield the desired result, the incident will be reclassified as a Severity 1 deficiency.
 - Severity 3: results in the system or a unit of the system producing incorrect, incomplete, or inconsistent results; however, does not result in the failure of the complete software system (Severity 1), or of a subsystem, key business or technical function, or software unit within the system (Severity 2). There is a documented, acceptable alternative that will yield the desired result. Note that if there is not a documented, acceptable alternative that will yield the desired result, the incident will be reclassified as a Severity 2 deficiency.
 - Severity 4: results in a less than desirable or less than preferable processing, reporting, or presentation of data by the system, whether upon input or after storage in the database; however, does not result in the failure of the complete software system (Severity 1), or of a subsystem, key business or technical function, or software unit within the system (Severity 2), or the system or a unit of the system producing incorrect, incomplete, or inconsistent results (Severity 3). Note that even if there is not a documented, acceptable alternative that will yield the desired result, a Severity 4 deficiency will not be reclassified to any other severity level as a consequence of the unavailability of an alternative.

For purposes of this section A.5.a., final determination of the acceptability of an alternative rests solely with the State.

- b. Problem Identification, Logging and Reporting - Problems may be identified through a number of means. Regardless of the means of identification, once a problem is identified, the State will log the problem by assigning the incident a unique incident number. The State will assign a severity level to the problem at the time the incident is

logged. The resulting incident log is the official record of outstanding issues to be addressed between the State and the Contractor.

The State will report a problem to the Contractor by emailing a description of the problem to the Contractor's designated staff. In the case of a Severity 1 or Severity 2 problem, the State will also contact the Contractor's designated staff by telephone. The State will designate a limited number of staff (at least one (1), but less than ten (10)) that is authorized to report problems to the Contractor. This same staff is the State's designee for receiving the Contractor's response to a problem report (refer to section A.5.c.). The Contractor will designate to the State a limited number of staff (at least one (1), but less than ten (10)) that is authorized to receive problems reports from the State. This same staff is the Contractor's designee for submitting to the State the Contractor's response to a problem report (refer to section A.5.c.). Refer to Attachment A for a listing of both the State's and the Contractor's designees for problem reporting and response.

- c. Problem Response - The Contractor will respond to the problem report depending upon the assigned severity level, as described below:
- For all Severity 1 deficiencies, the Contractor will respond, acknowledging receipt of the problem report, within the same business day of first reporting.
 - For all Severity 2 and Severity 3 deficiencies, the Contractor will respond, acknowledging receipt of the problem report, within twenty-four (24) hours from the time of first reporting.
 - For all Severity 4 deficiencies, the Contractor will respond, acknowledging receipt of the problem report, within twenty-four (24) hours from the time of first reporting. As a part of this acknowledgement, the Contractor will further categorize all Severity 4 deficiencies as a planned enhancement or a change order (refer to section A.7.).

For every Severity 2 and Severity 3 deficiency reported, and every Severity 4 deficiency reported and subsequently categorized as a planned enhancement, the Contractor will communicate to the State the version or version update, and the expected delivery date of the problem resolution (refer to section A.5.d.). The Contractor will provide this communication to the State within two (2) weeks from the time of first reporting.

- d. Problem Resolution – It is the State's desire to avoid a state of constant change that inevitably results from an expectation that the Contractor will immediately address all problem reports. However, it is the State's expectation that the Contractor will regularly prepare and release new versions and/or version updates such that problem reports are resolved. Therefore, the Contractor will strive to bring problem reports to resolution as follows:

- For all Severity 1 deficiencies, or other deficiencies ultimately reclassified as Severity 1 deficiencies as a consequence of the lack of a documented, acceptable alternative that will yield the desired result, the Contractor shall resolve the deficiency within twenty-four (24) hours from the time of first reporting or prior to the end of the Contract Term, whichever comes first. In the event that the Contractor cannot resolve the deficiency within the required timeframe, through no fault of the Contractor, then the Contractor may request the State to grant an extension in writing; the State shall not unreasonably deny such requests.

- For all Severity 2 and Severity 3 deficiencies, or other deficiencies ultimately reclassified as Severity 2 deficiencies as a consequence of the lack of a documented, acceptable alternative that will yield the desired result, the Contractor shall resolve the deficiency within the next version or version update, or prior to the end of the Contract Term, whichever comes first. It is the State's expectation that version updates will be released at a minimal frequency of every ninety (90) calendar days. Therefore, allowing for the lead time required to plan for the resolution to a problem report to be included in a version update, a given Severity 2 or Severity 3 deficiency should not remain unresolved for more than one hundred and twenty (120) calendar days. In the event that the Contractor cannot resolve the deficiency within the required timeframe, through no fault of the Contractor, then the Contractor may request the State to grant an extension in writing; the State shall not unreasonably deny such requests.
 - For all Severity 4 deficiencies that are categorized as a planned enhancement as described in section A.5.c., the Contractor shall resolve the deficiency within the next version release or prior to the end of the Contract Term, whichever comes first. It is the State's expectation that versions will be released at a minimal frequency of every six (6) months. Therefore, allowing for the lead time required to plan for the resolution to a problem report to be included in a version, a given Severity 4 deficiency that has been categorized as a planned enhancement as described in section A.5.c. should not remain unresolved for more than nine (9) months. In the event that the Contractor cannot resolve the deficiency within the required timeframe, through no fault of the Contractor, then the Contractor may request the State to grant an extension in writing; the State shall not unreasonably deny such requests.
 - For all Severity 4 deficiencies that are categorized as a change order, specification and delivery of the change order will be requested and accomplished as described in section A.7.
- e. Problem Monitoring – The Contractor will monthly prepare and provide a written status update on all outstanding issues between the State and the Contractor. The staff listed in Attachment A to this contract will quarterly review and discuss the status of all outstanding issues between the State and the Contractor. This discussion will be either in person or by teleconference.
- f. Pre-existing Problem Reports – Because the Contractor and the State have previously been in a contractual agreement related to the development of the TRIPS application under contract number FA-01-14462, it is acknowledged that there are outstanding problem reports as of the effective date of this contract. A log of those problem reports outstanding as of the effective date of this contract is included as Attachment C. Problem reports included on this log shall be considered, for purposes of this section A.5., as reported by the State, and acknowledged by the Contractor. The Contractor will, however, respond to each problem report listed in the log found in Attachment C, as follows:
- For Severity 4 deficiencies, the Contractor will categorize each as a planned enhancement or a change order (refer to section A.7.).
 - For Severity 2 and Severity 3 deficiencies, and every Severity 4 deficiency categorized as a planned enhancement, the Contractor will communicate to the State the version or version update, and the expected delivery date of the problem resolution (refer to section A.5.d.). The Contractor will provide this communication to the State within four (4) weeks of the contract effective date.

A.6. Performance Evaluation and Tuning.

If response time, and/or availability degrades below the level of compliance, as described in section A.1., the Contractor must take the necessary steps and measures to immediately bring the application back to the required level unless it is determined that factors outside the Contractor's control, such as the State's infrastructure, are the cause. In order to make a determination of the cause of the degradation in response time and/or availability, the State may request that the Contractor assist the State to evaluate performance factors including but not limited to the following:

- 1) Resource utilization – disk space, CPU utilization, available memory, memory utilization, and network utilization;
- 2) Processing – database sessions versus user sessions, transaction volumes, response times (end to end), input/output activity, and BEA WebLogic processes, including active execute queues, connections, garbage collection, idle threads, memory usage, server request time, sockets, throughput;
- 3) Installation – time to download to client on first connection and on subsequent updates under the following scenarios: from within the State network, from remote offices (with 28.8K, 33K, and 56K modem speeds), and from home/mobile connections (with 28.8K, 33K, and 56K modem speeds).

The Contractor will prepare, and submit to the State for review and approval, a Performance Evaluation Report that presents the findings of the evaluation of system performance. The Contractor will also provide recommendations to the State for the purpose of implementing changes for the technical environment such that response times indicated in section A.1. can be achieved.

Documentation of the results of the contractor's performance evaluation must show that minimum performance objectives as projected in the recommendations can be achieved. Detailed documentation must be provided, demonstrating how the network will achieve the required response time. All calculations and assumptions are to be shown. The documentation shall, at a minimum, show line speeds, devices supported per circuit and per location, routing, average and peak traffic load and average and worst case response times. Any proposed network addition must be able to integrate with the existing State network.

If the Contractor determines that factors outside the Contractor's control, such as the State's infrastructure, are the cause of the degradation in response time and/or availability, and the State agrees to the Contractor's determination, the Contractor will be reimbursed for assisting the State to evaluate such degradation in response time and/or availability. Reimbursement will be for actual effort incurred by the Contractor, not to exceed [WRITTEN AMOUNT (NUMBER)] hours, and at the rate(s) indicated in section C.3.

A.7. Change Orders and Statements of Work.

As stated in section A.1.b., it is the State's expectation of the Contractor that the software product(s) licensed to the State by means of this contract is enhanced and upgraded periodically by the Contractor. It is the State's desire to avoid making changes to said software product(s) that are outside of the Contractor's planned enhancements and upgrades.

If a Severity 4 deficiency is categorized by the Contractor as a change order, as described in section A.5.c., the State will determine whether circumstances are such that the State desires to make a change to the software product(s) licensed to the State by means of this contract, despite the fact that the change is not part of the Contractor's planned enhancements and upgrades. In such circumstances where the State determines to

make said change, this fact, along with the nature of the change, will be specified and delivered as described in a statement of work (SOW). The SOW form is located at Attachment B of this contract.

The State will submit an SOW to the Contractor by faxing the form to the Contractor's designated staff. The State will designate a limited number of staff (at least one (1), but less than ten (10)) that is authorized to submit SOW's to the Contractor (reference Attachment B to this contract). This same staff is the State's designee for receiving the Contractor's detailed estimate and maximum cost assertion. The Contractor will designate to the State a limited number of staff (at least one (1), but less than ten (10)) that is authorized to receive SOW's from the State. This same staff is the Contractor's designee for submitting to the State the Contractor's detailed estimate and maximum cost assertion.

The SOW consists of the following information and is completed as the process progresses:

- Detailed description of change requested (provided by the State), including any and all deliverables, specification of the programming and customization, etc., as applicable, conditions for acceptance, and the desired completion date; this description will be used by the Contractor in the preparation of a detailed estimate of the effort;
- Contractor's detail estimate of the effort required to deliver the change requested;
- Assertion from the Contractor of the maximum cost to deliver the change requested;
- Authorization to proceed from the State.

The detailed estimate prepared by the Contractor will be based on the units and per unit cost as described in section C.3.a. The Contractor will also sign the SOW indicating the maximum cost to the State to have the Contractor deliver the change requested. In order to prepare the detailed estimate, the Contractor is authorized to incur up to four (4) hours total billable effort per SOW. These billable hours should be itemized separately in the detailed estimate provided via the SOW.

The Contractor will return the completed SOW to the State within five (5) business days of receipt of the SOW by the Contractor. The State will either authorize the Contractor to proceed with the change requested or cancel the SOW with no further action on the part of the Contractor required. Should the State choose to cancel the SOW, the Contractor will be compensated for the actual effort (up to four (4) hours) incurred to prepare the detailed estimate that was included in the canceled SOW.

A.8. Quality Management and Warranty of Work.

- a. Quality Management – The Contractor is fully responsible for the quality (completeness, correctness, and usability) of deliverables (services and products defined in this contract) submitted to the State, unless otherwise noted in this contract. Therefore, the Contractor shall have instituted (defined, communicated, and ensured compliance with) processes and controls to ensure the responsibility for quality can be met. These processes and controls must address all forms of deliverables including static, textual deliverables and dynamic, executable deliverables.

The Contractor will track the progress of work on all forms and instances of deliverables produced and submitted to the State under the terms of this contract, and will report status to the State upon request. The Contractor will notify the State of any delays in the production of any deliverable, including but not limited to, new versions of the software product(s) licensed to the State by means of this contract, version

updates of said software product(s), or authorized change orders (SOW's). The Contractor will provide notification of such delays as soon as is reasonable following determination that a delay has occurred.

The Contractor will verify the quality of each deliverable before submitting it for State review and approval. By submitting a deliverable, the Contractor affirms that, to the best of its knowledge and understanding at that time, the deliverable meets the State's acceptance criteria.

To facilitate the above verification, the Contractor will maintain in its own technical infrastructure, an environment that sufficiently mimics the environment in which the TRIPS application operates. The Contractor will fully, sufficiently and successfully test any and all versions, version updates, and/or change orders (SOWs) using this mimicked environment prior to submission to the State. Such testing will cover both normal and exception processing. The Contractor will provide the results of such testing to the State upon request.

The State will provide support to the Contractor for producing acceptable deliverables. This support will include limited access to business subject matter experts, technical staff, relevant documentation, or other resources, as the State deems appropriate.

The State will control release of software into the State's test environment, determined in part by the Contractor's delivery to the State of all deliverables prerequisite to or associated with the release, and the State's approval of said deliverables. The State will make a reasonable effort to quickly and completely identify and report all deliverable deficiencies to the Contractor. However, the State will not represent nor agree that any specific report or list of deficiencies is an exhaustive list or a predictor of deliverable acceptance. The State will provide acceptance criteria for deliverables and will provide reasonable but limited advice to the Contractor regarding their interpretation. The State shall remain the sole judge of its criteria being met. The State will conduct a rigorous test of the software release, and document the test results. The State will report any issues or discrepancies discovered as a result of said test.

The Contractor will correct all deficiencies, issues, and/or discrepancies as required by the State. The Contractor will only be required to correct deficiencies, issues, and/or discrepancies that the State reports in writing.

The State will control release of software into the State's production environment, determined in part by the correction of all deficiencies, issues, and/or discrepancies as required by the State. The State will be the final authority as to determining whether a deficiency, issue, and/or discrepancy is fixed. The State will notify the Contractor in writing when acceptance has occurred.

- b. Warranty of Work – The Contractor expressly warrants the software product(s) licensed to the State by means of this contract, and any other products or services resulting from change orders or enhancements produced or provided by the Contractor to the State, as being compliant in all respects with the terms of the Contract or change order or enhancement request, and warrants that these products or services will be free from errors, defects, deficiencies or deviations, and that the products or services will perform in such a manner as the Contract, change order or enhancement request require, so that the intended function of the products or services is accomplished in all respects as intended by the Contract, the change order or enhancement request, and is otherwise consistent with industry standards.

The warranty period(s) shall be one (1) year and shall apply to all software products licensed to the State by means of this contract or software product(s) and/or services resulting from change orders (SOW's) or enhancements related to such software products.

The warranty period(s) shall begin with the date that the Contractor issues a new version of the software product(s), version update or upgrade of the software product(s), software product(s) fixes, and/or performance enhancement releases. If any change orders (SOW's) or enhancements are requested by the State, the one (1) year warranty period begins on the date the State provides written acceptance of the product(s) or service(s) resulting from a change order (SOW) or enhancement request.

The warranty shall be applicable when State staff performs any function under direction of the Contractor.

The warranty encompasses any errors, defects, deficiencies or deviations discovered in any product(s) or service(s), and errors created in State data caused by such error, defect, deficiency or deviation.

The warranty requires the correction by the Contractor of all products or services containing any errors, defects, deficiencies or deviations, correction of errors in State data caused by such, and any necessary modifications or revisions to product(s) or service(s), including but not limited to the design, coding and operation of the software to perform any function required by the Contract, whether occurring in the original contract (FA-01-14462) and its amendments or this Contract, or whether resulting from a change order (SOW) or enhancement requested by the State, or which is procured in any amendment to the Contract, in any interfaces that are created and in all documentation provided by the Contractor.

If Contractor personnel determine that the problem is not the fault of Contractor-provided software product(s) or service(s), the Contractor shall notify the State immediately. If the State agrees, the Contractor will be reimbursed for investigating the problem. Reimbursement will be for actual effort incurred by the Contractor, not to exceed [WRITTEN AMOUNT (NUMBER)] hours, and at the rate(s) indicated in section C.3.

A.9. On Site Assistance.

In some cases, at the State's request and with prior written approval, Contractor personnel may be required to travel and to work on location at the State's offices in Nashville, Tennessee. Such travel expenses will be reimbursed as per section C.4.

B. CONTRACT TERM:

B.1. Contract Term.

This Contract shall be effective for the period commencing on March 15, 2006 and ending on March 14, 2009. The State shall have no obligation for services rendered by the Contractor that are not performed within the specified period.

B.2. Term Extension.

The State reserves the right to extend this Contract for an additional period or periods of time representing increments of no more than one year and a total contract term of no

more than five (5) years, provided that the State notifies the Contractor in writing of its intention to do so at least ninety (90) days prior to the contract expiration date. An extension of the term of this Contract will be affected through an amendment to the Contract. If the extension of the Contract necessitates additional funding beyond that which was included in the original Contract, the increase in the State's maximum liability will also be affected through an amendment to the Contract and shall be based upon rates provided for in the original contract.

C. PAYMENT TERMS AND CONDITIONS:

C.1. Maximum Liability.

In no event shall the maximum liability of the State under this Contract exceed [WRITTEN DOLLAR AMOUNT] (\$[NUMBER AMOUNT]). The rates and limits in Section C.3 shall constitute the entire compensation due the Contractor for the products, services, and all of the Contractor's obligations hereunder regardless of the difficulty, materials or equipment required. The rates and limits include, but are not limited to, all applicable taxes, fees, overheads, and all other direct and indirect costs incurred or to be incurred by the Contractor.

The Contractor is not entitled to be paid the maximum liability for any period under the Contract or any extensions of the Contract for work not requested by the State. The maximum liability represents available funds for payment to the Contractor and does not guarantee payment of any such funds to the Contractor under this Contract unless the State requests work and the Contractor performs said work. In which case, the Contractor shall be paid in accordance with the rates and limits detailed in Section C.3. The State is under no obligation to request work from the Contractor in any specific dollar amounts or to request any work at all from the Contractor during any period of this Contract.

C.2. Compensation Firm.

The rates and limits, and the Maximum Liability of the State under this Contract are firm for the duration of the Contract and are not subject to escalation for any reason unless amended.

C.3. Payment Methodology.

The Contractor shall be compensated based on the rates and limits herein for products and services authorized by the State in a total amount not to exceed the Contract Maximum Liability established in Section C.1. The Contractor's compensation shall be contingent upon the State's acceptance of deliverable(s) as defined in Section A. With the exception of software licensing (Annual Upgrade and Support ("software licensing") agreement), the State will not consider any deliverable to be final or eligible for payment until the State has notified the Contractor in writing that acceptance has occurred. Partial payment for deliverables that have not been fully completed and accepted will not be considered. Payment of invoices associated with the Annual Upgrade and Support ("software licensing") agreement is assumed accepted if the State does NOT notify the Contractor of its intent to terminate the contract as defined in Sections D.3. and D.4. prior to the applicable due date as defined in Section C.3.b. The Contractor shall submit all invoices, in form and substance acceptable to the State with all of the necessary supporting documentation, prior to any payment. The Contractor shall be compensated based upon the following rates and limits:

a. Hourly Reimbursement Rates.

<u>Service Unit</u>	<u>Year One Rate</u>	<u>Year Two Rate</u>	<u>Year Three Rate</u>
Project Manager	[\$AMOUNT]/hour	[\$AMOUNT]/hour	[\$AMOUNT]/hour
Systems Analyst	[\$AMOUNT]/hour	[\$AMOUNT]/hour	[\$AMOUNT]/hour
Business Analyst	[\$AMOUNT]/hour	[\$AMOUNT]/hour	[\$AMOUNT]/hour
Programmer Analyst	[\$AMOUNT]/hour	[\$AMOUNT]/hour	[\$AMOUNT]/hour

OR

Change Order Labor	[\$AMOUNT]/hour	[\$AMOUNT]/hour	[\$AMOUNT]/hour
Performance Evaluation and Tuning Labor	[\$AMOUNT]/hour	[\$AMOUNT]/hour	[\$AMOUNT]/hour
Problem Investigation Labor	[\$AMOUNT]/hour	[\$AMOUNT]/hour	[\$AMOUNT]/hour

The maximum liability of the State under this contract for hourly reimbursements will be [WRITTEN DOLLAR AMOUNT] (\$[NUMBER AMOUNT]). Invoices for said hourly reimbursements will be submitted upon the State's written notification that acceptance of all deliverables associated with the change order (SOW), performance evaluation and tuning, and/or problem investigation has occurred.

b. Software Licensing.

A.2. The Annual Upgrade and Support ("software licensing") agreement, in the amount of [WRITTEN DOLLAR AMOUNT] (\$[NUMBER AMOUNT]), will be paid in one single payment due at the time of invoicing. The Contractor will submit a separate invoice for payment, which shall reflect a due date of December 31st of the applicable year. The first such invoice under this contract will reflect a due date of December 31, 2006.

The maximum liability of the State under this contract for software licensing will be [WRITTEN DOLLAR AMOUNT] (\$[NUMBER AMOUNT]). Invoices for said software licensing will be submitted on an annual basis.

c. Travel Expense Reimbursement.

The maximum liability of the State under this contract for reimbursable travel expense will be the amount of actual travel expense incurred not to exceed [WRITTEN DOLLAR AMOUNT] (\$[NUMBER AMOUNT]). Invoices for said travel expense will be submitted on a monthly basis.

C.4. Travel Compensation.

Compensation to the Contractor for travel, meals, or lodging, as authorized per section A.9., shall be subject to amounts and limitations specified in the "State Comprehensive Travel Regulations," as they are amended from time to time. Further, reimbursement for air travel will not exceed the rate for coach seating. Payment of travel expenses shall be as described in section C.3.c.

C.5. Payment of Invoice.

The payment of the invoice by the State shall not prejudice the State's right to object to or question any invoice or matter in relation thereto. Such payment by the State shall neither be construed as acceptance of any part of the work or service provided nor as an approval of any of the amounts invoiced therein.

C.6. Invoice Reductions.

The Contractor's invoice shall be subject to reduction for amounts included in any invoice or payment theretofore made which are determined by the State, on the basis of audits conducted in accordance with the terms of this contract, not to constitute proper remuneration for compensable services.

C.7. Deductions.

The State reserves the right to deduct from amounts which are or shall become due and payable to the Contractor under this or any contract between the Contractor and the State of Tennessee any amounts which are or shall become due and payable to the State of Tennessee by the Contractor.

C.8. Automatic Deposits.

The Contractor shall complete and sign an "Authorization Agreement for Automatic Deposit (ACH Credits) Form." This form shall be provided to the Contractor by the State. Once this form has been completed and submitted to the State by the Contractor all payments to the Contractor, under this or any other contract the Contractor has with the State of Tennessee shall be made by Automated Clearing House (ACH). The Contractor shall not invoice the State for services until the Contractor has completed this form and submitted it to the State.

D. STANDARD TERMS AND CONDITIONS:

D.1. Required Approvals. The State is not bound by this Contract until it is approved by the appropriate State officials in accordance with applicable Tennessee State laws and regulations.

D.2. Modification and Amendment. This Contract may be modified only by a written amendment executed by all parties hereto and approved by the appropriate Tennessee State officials in accordance with applicable Tennessee State laws and regulations.

D.3. Termination for Convenience. The State may terminate this Contract without cause for any reason. Said termination shall not be deemed a Breach of Contract by the State. The State shall give the Contractor at least ninety (90) days written notice before the effective termination date. The Contractor shall be entitled to receive compensation for satisfactory, authorized service completed as of the termination date, but in no event shall the State be liable to the Contractor for compensation for any service that has not been rendered. Upon such termination, the Contractor shall have no right to any actual general, special, incidental, consequential, or any other damages whatsoever of any description or amount.

D.4. Termination for Cause. If the Contractor fails to properly perform its obligations under this Contract in a timely or proper manner, or if the Contractor violates any terms of this Contract, the State shall have the right to immediately terminate the Contract and withhold payments in excess of fair compensation for completed services. Notwithstanding the

above, the Contractor shall not be relieved of liability to the State for damages sustained by virtue of any breach of this Contract by the Contractor.

- D.5. Subcontracting. The Contractor shall not assign this Contract or enter into a subcontract for any of the services performed under this Contract without obtaining the prior written approval of the State. If such subcontracts are approved by the State, they shall contain, at a minimum, sections of this Contract pertaining to "Conflicts of Interest" and "Nondiscrimination" (sections D.6. and D.7.). Notwithstanding any use of approved subcontractors, the Contractor shall be the prime contractor and shall be responsible for all work performed.
- D.6. Conflicts of Interest. The Contractor warrants that no part of the total Contract Amount shall be paid directly or indirectly to an employee or official of the State of Tennessee as wages, compensation, or gifts in exchange for acting as an officer, agent, employee, subcontractor, or consultant to the Contractor in connection with any work contemplated or performed relative to this Contract.
- D.7. Nondiscrimination. The Contractor hereby agrees, warrants, and assures that no person shall be excluded from participation in, be denied benefits of, or be otherwise subjected to discrimination in the performance of this Contract or in the employment practices of the Contractor on the grounds of disability, age, race, color, religion, sex, national origin, or any other classification protected by Federal, Tennessee State constitutional, or statutory law. The Contractor shall, upon request, show proof of such nondiscrimination and shall post in conspicuous places, available to all employees and applicants, notices of nondiscrimination.
- D.8. Records. The Contractor shall maintain documentation for all charges against the State under this Contract. The books, records, and documents of the Contractor, insofar as they relate to work performed or money received under this contract, shall be maintained for a period of three (3) full years from the date of the final payment and shall be subject to audit at any reasonable time and upon reasonable notice by the State, the Comptroller of the Treasury, or their duly appointed representatives. The financial statements shall be prepared in accordance with generally accepted accounting principles.
- D.9. Monitoring. The Contractor's activities conducted and records maintained pursuant to this Contract shall be subject to monitoring and evaluation by the State, the Comptroller of the Treasury, or their duly appointed representatives.
- D.10. Progress Reports. The Contractor shall submit brief, periodic, progress reports to the State as requested.
- D.11. Strict Performance. Failure by any party to this Contract to insist in any one or more cases upon the strict performance of any of the terms, covenants, conditions, or provisions of this Contract shall not be construed as a waiver or relinquishment of any such term, covenant, condition, or provision. No term or condition of this Contract shall be held to be waived, modified, or deleted except by a written amendment signed by the parties hereto.
- D.12. Independent Contractor. The parties hereto, in the performance of this Contract, shall not act as employees, partners, joint venturers, or associates of one another. It is expressly acknowledged by the parties hereto that such parties are independent contracting entities and that nothing in this Contract shall be construed to create an employer/employee relationship or to allow either to exercise control or direction over the manner or method by which the other transacts its business affairs or provides its usual services. The employees or agents of one party shall not be deemed or construed to be the employees or agents of the other party for any purpose whatsoever.

The Contractor, being an independent contractor and not an employee of the State, agrees to carry adequate public liability and other appropriate forms of insurance, including adequate public liability and other appropriate forms of insurance on the Contractor's employees, and to pay all applicable taxes incident to this Contract.

- D.13. State Liability. The State shall have no liability except as specifically provided in this Contract.
- D.14. Force Majeure. The obligations of the parties to this contract are subject to prevention by causes beyond the parties' control that could not be avoided by the exercise of due care including, but not limited to, acts of God, riots, wars, strikes, epidemics or any other similar cause.
- D.15. State and Federal Compliance. The Contractor shall comply with all applicable State and Federal laws and regulations in the performance of this Contract.
- D.16. Governing Law. This Contract shall be governed by and construed in accordance with the laws of the State of Tennessee. The Contractor agrees that it will be subject to the exclusive jurisdiction of the courts of the State of Tennessee in actions that may arise under this Contract. The Contractor acknowledges and agrees that any rights or claims against the State of Tennessee or its employees hereunder, and any remedies arising there from, shall be subject to and limited to those rights and remedies, if any, available under ***Tennessee Code Annotated***, Sections 9-8-101 through 9-8-407.
- D.17. Completeness. This Contract is complete and contains the entire understanding between the parties relating to the subject matter contained herein, including all the terms and conditions of the parties' agreement. This Contract supersedes any and all prior understandings, representations, negotiations, and agreements between the parties relating hereto, whether written or oral.
- D.18. Severability. If any terms and conditions of this Contract are held to be invalid or unenforceable as a matter of law, the other terms and conditions hereof shall not be affected thereby and shall remain in full force and effect. To this end, the terms and conditions of this Contract are declared severable.
- D.19. Headings. Section headings of this Contract are for reference purposes only and shall not be construed as part of this Contract.

E. SPECIAL TERMS AND CONDITIONS:

- E.1. Conflicting Terms and Conditions. Should any of these special terms and conditions conflict with any other terms and conditions of this Contract, these special terms and conditions shall control.
- E.2. Communications and Contacts. All instructions, notices, consents, demands, or other communications required or contemplated by this Contract shall be in writing and shall be made by facsimile transmission, by overnight courier service, or by first class mail, postage prepaid, addressed to the respective party at the appropriate facsimile number or address as set forth below or to such other party, facsimile number, or address as may be hereafter specified by written notice.

The State:

Debbie Knox, Quality Assurance Manager
Information Systems Management
Department of Finance and Administration
W.R. Snodgrass Tennessee Tower, 20th Floor
312 8th Avenue North
Nashville, TN 37243
(615) 741-4099
(615) 741-1789

The Contractor:

Art Krozser, Vice President, Operations
CyberShift, Inc.
239 New Road, Building B
Parsippany, NJ 07054
(973) 364-0480 Ext. 3247
(973) 575-3527

All instructions, notices, consents, demands, or other communications shall be considered effectively given as of the day of delivery; as of the date specified for overnight courier service delivery; as of three (3) business days after the date of mailing; or on the day the facsimile transmission is received mechanically by the telefax machine at the receiving location and receipt is verbally confirmed by the sender if prior to 4:30 p.m. CST. Any communication by facsimile transmission shall also be sent by United States mail on the same date of the facsimile transmission.

- E.3. Subject to Funds Availability. The Contract is subject to the appropriation and availability of State and/or Federal funds. In the event that the funds are not appropriated or are otherwise unavailable, the State reserves the right to terminate the Contract upon written notice to the Contractor. Said termination shall not be deemed a breach of Contract by the State. Upon receipt of the written notice, the Contractor shall cease all work associated with the Contract. Should such an event occur, the Contractor shall be entitled to compensation for all satisfactory and authorized services completed as of the termination date. Upon such termination, the Contractor shall have no right to recover from the State any actual, general, special, incidental, consequential, or any other damages whatsoever of any description or amount.

E.4. Ownership of Work Products.

a. Definition of Work Products.

- i. "Work products" shall mean all software, documentation, deliverables and any other items provided by the Contractor pursuant to this contract, including if applicable, Custom-Developed Application Software, Rights Transfer Application Software, and the source code pertaining thereto. These software categories are defined as follows:
- a. Custom-Developed Application Software – Any application software developed for the State under the terms of this Contract.
 - b. Rights Transfer Application Software – Any pre-existing Contractor developed/owned application software, including but not limited to, modules, complete applications, components, builds and/or individual lines of software code provided as a part of the overall solution, and to which the Contractor shall grant all rights and provide source code to the State.

- ii. The only categories of software NOT included in "work products", if applicable, are the following:
 - a. Contractor Owned Core System Software, and
 - b. Proprietary Operating Environment/Utility Software provided at established catalog or market prices and sold or leased to the general public (examples include operating system software and database management systems).
- b. State Ownership of Work Products. The State shall have all ownership right, title, and interest, including ownership of copyright, in all work products, including application software, source code, or modifications thereof and associated documentation, created, designed, developed, derived, documented, installed and/or delivered for the State under this Contract. The State shall have royalty-free, non-exclusive, and unlimited rights to use, modify, disclose, reproduce, and/or publish for any purpose whatsoever, all said work products. The Contractor shall furnish the work products upon request of the State, in accordance with the Contract and applicable State law. With State approval, the Contractor will be able to use the application source code and documentation where they may have applicability with other state and local government entities.
- c. Contractor-Owned Core System Software. This includes commercially available application software, including Commercial Off-The-Shelf (COTS) solutions that are owned by the Contractor, and are used to deliver the core or primary solution functionality.

The Contractor shall retain ownership right, title, and interest in the portions of the application that were not developed using State moneys or resources, and that were complete and the property of the Contractor as of the effective date of the contract (known as "Contractor proprietary products"). The following provisions apply:

 - i. The Contractor hereby grants the State a perpetual, royalty-free, paid-up, irrevocable, unlimited, non-exclusive and non-assignable right to use the Contractor proprietary products for the State's business purposes, including but not limited to access by users who are not employees of the State for the purpose of transacting State business, and access by any future service providers with whom the State may contract. The Contractor warrants that Contractor is duly authorized to grant this right.
 - ii. Contractor proprietary software that does not become the property of the State under this contract will only be provided to persons as necessary for the performance of the contract. The State will not copy or retain Contractor proprietary information beyond what is necessary for the performance under this contract and the use of work product produced there under. This provision does not apply to disclosures required by court order or Tennessee statutes.
- d. Proprietary Operating Environment/Utility Software Packages. The State shall enter into licensing agreements directly with the owners of these products. The State's rights and obligations shall be in accordance with applicable licensing agreements, provided that these agreements are not in conflict with State law or with the State's requirements as expressed under this contract.
- e. Acquired Knowledge and Skills. Nothing in this contract shall prohibit the Contractor's use for its own purposes of the general knowledge, skills, experience, ideas, concepts, know-how, and techniques obtained and used during the course of providing the services requested under this contract.
- f. Development of Similar Materials. Nothing in this contract shall prohibit the Contractor from developing for itself, or for others, materials which are similar to and/or competitive with those that are produced under this contract.

E.5. Incorporation of Additional Documents. Included in this Contract by reference are the following documents:

- a. This contract document and its attachments, and
- b. Technical Specifications provided to the Contractor.

In the event of a discrepancy or ambiguity regarding the Contractor's duties, responsibilities, and performance under this Contract, these documents shall govern in order of precedence detailed above.

E.6. Workpapers Subject to Review. The Contractor shall make all audit, accounting, or financial analysis workpapers, notes, and other documentation available for review by the Comptroller of the Treasury or his representatives, upon request, during normal working hours either while the analysis is in progress or subsequent to the completion of this Contract.

E.7. Public Funding Notice. All notices, informational pamphlets, press releases, research reports, signs, and similar public notices prepared and released by the Contractor relative to this Contract shall include the statement, "This project is funded under an agreement with the State of Tennessee." Any such notices by the Contractor shall be approved by the State.

E.8. Prohibited Advertising. The Contractor shall not refer to this Contract or the Contractor's relationship with the State hereunder in commercial advertising in such a manner as to state or imply that the Contractor or the Contractor's services are endorsed.

E.9. Confidentiality of Records. Strict standards of confidentiality of records shall be maintained in accordance with the law. All material and information, regardless of form, medium or method of communication, provided to the Contractor by the State or acquired by the Contractor on behalf of the State shall be regarded as confidential information in accordance with the provisions of State law and ethical standards and shall not be disclosed, and all necessary steps shall be taken by the Contractor to safeguard the confidentiality of such material or information in conformance with State law and ethical standards.

The Contractor will be deemed to have satisfied its obligations under this section by exercising the same level of care to preserve the confidentiality of the State's information as the Contractor exercises to protect its own confidential information so long as such standard of care does not violate the applicable provisions of the first paragraph of this section.

The Contractor's obligations under this section do not apply to information in the public domain; entering the public domain but not from a breach by the Contractor of this Contract; previously possessed by the Contractor without written obligations to the State to protect it; acquired by the Contractor without written restrictions against disclosure from a third party which, to the Contractor's knowledge, is free to disclose the information; independently developed by the Contractor without the use of the State's information; or, disclosed by the State to others without restrictions against disclosure.

It is expressly understood and agreed the obligations set forth in this section shall survive the termination of this Contract.

E.10. Copyrights and Patents. The Contractor agrees to indemnify and hold harmless the State of Tennessee as well as its officers, agents, and employees from and against any and all claims or suits which may be brought against the State for infringement of any laws regarding patents or copyrights which may arise from the Contractor's performance of this

Contract. In any such action brought against the State, the Contractor shall satisfy and indemnify the State for the amount of any final judgment for infringement. The Contractor further agrees it shall be liable for the reasonable fees of attorneys for the State in the event such service is necessitated to enforce the terms of this Contract or otherwise enforce the obligations of the Contractor to the State. The State shall give the Contractor written notice of any such claim or suit and full right and opportunity to conduct the Contractor's own defense thereof.

- E.11. Authorized Individuals. Each party hereto has provided the other party hereto with a list identifying the individuals from whom the other party is authorized to accept any notices, requests, demands, or other advice that may be given hereunder by the party providing such list. Said lists, which are attached hereto as Attachments A and B, shall be valid until revoked or amended by further written notice. The parties hereto shall only be entitled to rely on notices, requests, demands, or other advice given by such individuals.
- E.12. Date/Time Hold Harmless. As required by **Tennessee Code Annotated**, Section 12-4-118, the contractor shall hold harmless and indemnify the State of Tennessee; its officers and employees; and any agency or political subdivision of the State for any breach of contract caused directly or indirectly by the failure of computer software or any device containing a computer processor to accurately or properly recognize, calculate, display, sort or otherwise process dates or times.
- E.13. Tennessee Consolidated Retirement System. The Contractor acknowledges and understands that, subject to statutory exceptions contained in **Tennessee Code Annotated**, Section 8-36-801, *et. seq.*, the law governing the Tennessee Consolidated Retirement System (TCRS), provides that if a retired member of TCRS, or of any superseded system administered by TCRS, or of any local retirement fund established pursuant to **Tennessee Code Annotated**, Title 8, Chapter 35, Part 3 accepts state employment, the member's retirement allowance is suspended during the period of the employment. Accordingly and notwithstanding any provision of this Contract to the contrary, the Contractor agrees that if it is later determined that the true nature of the working relationship between the Contractor and the State under this Contract is that of "employee/employer" and not that of an independent contractor, the Contractor may be required to repay to TCRS the amount of retirement benefits the Contractor received from TCRS during the period of this Contract.

IN WITNESS WHEREOF:

CYBERSHIFT, INCORPORATED:

Thomas Altier, Chief Financial Officer

Date

DEPARTMENT OF FINANCE AND ADMINISTRATION:

M.D. Goetz, Jr., Commissioner

Date

APPROVED:

DEPARTMENT OF FINANCE AND ADMINISTRATION:

M. D. Goetz, Jr., Commissioner

Date

COMPTROLLER OF THE TREASURY:

John G. Morgan, Comptroller of the Treasury

Date

Attachment A: Designees for problem reporting and response

Attachment B: Statement of Work Authorized Persons

**Attachment C: Log of Outstanding Problem Reports as of the
Contract Effective Date**